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Sansom v. Southern Railway Co. (C. C. A.), 111 Fed. 887, is most apposite. Enough has been said of the former to show the pertinency of the following:

Per Day, Circuit Judge:

"In cases where the propriety of the court's action in instructing a verdict for the defendant is in review, certain general principles are to be borne in mind. The view of the case most favorable to the plaintiff is to be taken in determining whether the case is to be submitted to a jury. In cases of alleged negligence where the facts are undisputed the question of liability is often one of fact, not of law. Except in those cases where the law has clearly defined a specific duty, the omission of which may constitute negligence, the solution of the problem depends upon whether the conduct in question is deemed to be that of one of ordinary prudence under the same or similar circumstances. Who shall determine this matter? Is it one of fact or law? A court may not set up its own standard of ordinary care, and require the party to conform to that, and permit a recovery or otherwise as it may determine the facts to show ordinary prudence, or the lack of it, in the conduct under investigation, except in cases where fair-minded men would be agreed that the facts did or did not show a want of due care. Judge Cooley concludes an elaborate discussion of the question in this way:

'If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, 'In the judgment of the law, this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence, or the want of it, as one of law.' Cooley, Torts, 670.

"This rule is in conformity with *Railroad Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485, and *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274."

The same general ruling is made in *South Penn. Oil Co. v. Latshaw* (C. C. A.), 111 Fed. 598, in which Goff, J., calls attention to "the utter disregard of the rules of this court and of the Supreme Court of the United States," in the preparation of the bills of exception in the case at bar. "A separate assignment of error in respect to each part of the court's charge alleged to be erroneous, as well as to each instruction given, should have been taken."

We cannot too earnestly recommend to counsel not familiar with federal *nisi prius* practice, the careful study of these cases and the authorities cited therein. See further, *Eastman v. Newman* (C. C. A.), 112 Fed. 122.

EXECUTOR'S DUTY TO DEFEND WILL—ATTORNEY'S FEES WHEN ESTATE INSOLVENT.—Reference was made in our January number (*ante* p. 650) to a recent decision of the Supreme Court of the District of Columbia, allowing to an executor attorney's fees paid in the unsuccessful defense of the will. The same court has since held, distinguishing that case, that such an allowance cannot be made where the estate is *insolvent*, so that the burden would fall on the creditors of the estate, to whom it is a matter of indifference whether there is a valid will or not. *Hamilton v. Shillington*, 30 Wash. Law Reporter, 39.

The court said in part:

"Whether a deceased person has left a will or has died intestate, is of no consequence whatever in law to the creditors. Whether their paymaster is to be an executor appointed by the testator, or an administrator appointed by the court, is a matter of utter indifference to them. They are only interested to receive from the estate the amount of their just claims; and by whom these claims are paid to them is no concern of theirs. They are not interested in the contests over wills. The question of the validity or invalidity of wills is one which does not concern them and in which they have no right whatever to intervene. It may, perhaps, be well characterized as a disgrace to the condition of our testamentary law, that creditors are oftentimes postponed for years in the satisfaction of their just demands, while legatees and next of kin are engaged in virulent legal strife, to determine which of them shall enjoy the residue of the estate after the payment of the debts; for this is all that such strife can mean in law, and this is precisely what has happened in the present case. It would scarcely be unfair to characterize as the addition of insult to injury, that, in addition to such postponement of the satisfaction of their claims, they should also be called upon to pay the costs of such litigation. This also is what has happened in the present case, and what may happen in every case of an insolvent estate. Now, assuredly there can be no warrant of law, or of reason, or of common sense, to require one man to pay the costs of the litigation of two other men, with which he has no connection whatever, other than the unfortunate connection, that, in the fund for which they are contending, he has a claim paramount to each and both of them, but which he cannot have satisfied until their litigation has been settled. . . .

"Unless, therefore, we can bring this allowance of compensation under the head of 'costs of administration' of the estate, it is very clear that it cannot be made a charge against the fund, so far as that fund is necessary for the payment of creditors. But to call it costs of administration does not make it such; it is liable to the same objection by whatever name we call it.

"It has been decided that an executor successfully defending a will may be allowed for counsel fees contracted to be paid for such defense. We have even gone farther, and have held in the case of *Tuohy v. Hanlon*, 29 D. C. App. 417, that a person named as executor in a paper writing purporting to be a will, who has signified his acceptance of the trust by filing a petition for its probate and who has defended it in good faith, although unsuccessfully, may be allowed for counsel fees expenses in such defense. But all these cases were cases between the legatees on the one side and the next of kin on the other; and as between them the charge was held to be a proper item in the cost of administration. We fail to find any case in which the fund necessary for the payment of creditors was charged with such costs. Where the estate is entirely solvent, such a charge necessarily falls on the residuary fund payable to legatees or next of kin, by whatever name it is called; but where the estate is insolvent, as in the case now before us, the charge, if allowed, would have to be borne by the creditors and paid out of the fund which would otherwise have gone to them, notwithstanding that they had been neither concerned nor consulted in the litigation. To impose such a burden on the creditors is against the fundamental principles of right and justice, and there is no warrant for it in the law.

"Undoubtedly there are cases in which, even as against creditors, compensation may be allowed for counsel fees; as where it has been necessary to defend the estate against attack which would have materially diminished or destroyed it, or where it has been necessary to institute legal proceedings to recover assets for the estate. But in all such cases the creditors are equally concerned with those entitled to the residuum, perhaps even more concerned; and it is plain that in such cases compensation may be allowed. But no such case is presented here."

The decision of the question of allowance of attorney's fees to the executor in contested proceedings to probate the will, depends upon whether it is his duty to actively defend the will or not. Upon this point the authorities are inharmonious. They are collected in 11 Am. & Eng. Enc. Law, 910, 1243-1244.